STATE OF MICHIGAN

COURT OF APPEALS

CITY OF FRANKFORT,

Plaintiff-Appellant,

v

POLICE OFFICERS ASSOCIATION OF MICHIGAN, INC,

Defendant-Appellee.

UNPUBLISHED
September 15, 2009

No. 286523
Benzie Circuit Court
LC No. 07-008083-CK

Before: Meter, P.J., and Murray and Beckering, JJ.

BECKERING, J. (*dissenting*).

I respectfully dissent from the majority's decision to reverse the arbitrator's October 1, 2007, opinion and award. This case arises out of a grievance filed with plaintiff city of Frankfort by defendant Police Officers Association of Michigan (POAM) based on the city's failure to recall former city police officer Tim Cavric after his layoff. Upon review of the parties' collective bargaining agreement (CBA) and other evidence presented by the parties regarding the enactment of the CBA, the arbitrator granted the POAM's grievance, ordering the city to reinstate Officer Cavric and "make him whole" for lost wages and benefits. At issue on appeal is not whether we agree with the arbitrator's factual findings or decision on the merits, but whether the arbitrator disregarded the scope of his contractual authority, dispensing "his own brand of industrial justice." See *Police Officers Ass'n of Michigan v Manistee Co*, 250 Mich App 339, 343; 645 NW2d 713 (2002); *Sheriff of Lenawee Co v Police Officers Labor Council*, 239 Mich App 111, 119; 607 NW2d 742 (1999) (quotation marks and citation omitted). Because I believe that in granting the POAM's grievance, the arbitrator was "arguably construing or applying the [CBA] and acting within the scope of his authority," *Ann Arbor v AFSCME Local 369*, ___ Mich App ___; ___ NW2d ___ (Docket No. 283814, issued May 28, 2009), slip op at 11, (quotation marks and citations omitted), I would affirm.

I. Relevant Facts and Procedural History

The city hired Officer Cavric as a full-time patrol officer in July 2000. He was laid off in April 2003. At that time, section 8.6 of the parties' CBA provided that "[l]ayoffs, recalls, overtime assignments, vacation picks, [and] schedule picks shall all be on the basis of departmental seniority." Following Officer Cavric's layoff and the expiration of the CBA, the parties signed a new CBA, effective July 1, 2004 to June 30, 2007. The new CBA contained a provision almost identical to section 8.6 of the expired CBA. It also contained a new provision,

section 8.8, which provided that "[e]ffective July 1, 2004, an employee's right to recall ends after the employee has been offered a position (regardless of whether the employee accepts or rejects it) or twelve (12) months after the employee has been laid off, whichever is earlier." At the time the new CBA went into effect, Officer Cavric had been laid off for 15 months.

In June 2006, the city hired a part-time police officer on a temporary basis. Thereafter, the POAM filed a grievance with the city, based on the city's failure to offer the position to Officer Cavric. The matter was subsequently submitted to arbitration. At the arbitration hearing, the POAM asserted that during negotiations for the new CBA, the parties agreed that section 8.8 would not apply to Officer Cavric until after he was recalled. According to the POAM, the city's refusal to abide by this agreement denied Officer Cavric his recall rights under section 8.6 of the expired CBA, and "under the terms of the [new CBA's section] 8.8, as agreed to by [the city], tacitly, if not verbally." Witnesses for the POAM testified that when the city issued its written proposal to add section 8.8 to the new CBA, the POAM orally asserted that it would only accept section 8.8 if Officer Cavric's "recall rights as specified in the expiring contract were preserved" until after the officer was recalled to fill a vacancy. The city never responded to the POAM's "counter-proposal," and the witnesses took the city's silence as a "tacit agreement." Witnesses for the city testified that there was never an agreement, tacit or otherwise, to except Officer Cavric from section 8.8.

In his opinion and award, the arbitrator made no specific factual determination whether the parties reached an agreement on the applicability of section 8.8 to Officer Cavric. As noted by the majority, the arbitrator states in Section III of his opinion and award, that "[h]owever credible, the case for or against the grievance cannot be made on the basis of witness testimony. In the face of this standoff, one must look elsewhere."

The arbitrator then embarked on a legal analysis in Sections IV through VII of his opinion and award. The arbitrator distinguished several cases cited by the parties from the instant case, noting, among other things, that most contract negotiations impact seniority rights of all employees, not a specific individual. He also noted that the stated objective of section 8.8–to avoid recalling employees laid off for 10 or 20 years–would still be accomplished if the section were applied to Officer Cavric after he had been recalled.

Most significantly, the arbitrator identified *two* approaches to contract interpretation. He first addressed the strict construction or "plain meaning" approach and commented that the city made "a strong argument" that it should be used in interpreting the parties' CBA. The arbitrator agreed that under that approach, there was "no other interpretation" than that section 8.8 legitimately terminated Officer Cavric's recall rights. But, the arbitrator then used the key word, "however," signaling his belief that the strict construction/plain meaning approach was neither mandatory nor perfect. Quoting a publication by the American Bar Association (ABA) Section of Labor and Employment Law,[1] the arbitrator stated:

[1] Elkouri & Elkouri, How Arbitration Works (6th ed).

However,

> "'the plain meaning rule', although still dominant, has been uniformly criticized and rejected in the academic literature by both 'objectivist' and 'subjectivist' commentators, by jurists in more recent Court decisions, and by a growing number of arbitrators."

The arbitrator then identified an alternative method of contract interpretation, which is described in comment b to section 212 of the Restatement of Contracts, 2d, and favorably addressed in the same ABA publication. Quoting the comment, the arbitrator stated:

> "It is sometimes said that extrinsic evidence cannot change the plain meaning of the writing, but meaning can almost never be plain except in a context[. . . .]Any determination of meaning or ambiguity should only be made in light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties[. . . .]But after the transaction has been shown in all its length and breadth, the words of an integrated agreement remains the most important evidence of intentions."

Having identified these two approaches to contract interpretation, the arbitrator rendered his decision:

> Granting that the words of the Contract are clear and unambiguous, and that they reflect "the most important of intentions", in this case "the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties . . . ", taken together, outweigh the plain meaning of the words in Article 8.8.

Award

> The grievance is granted. Employer is ordered to reinstate Grievant, and to make him whole for all losses in wages and benefits incurred since June 14, 2006, date of the grievance.

The city filed a complaint to vacate the arbitration award, and the parties filed motions for summary disposition. Following a hearing on the matter, the trial court issued an opinion and order granting summary disposition in favor of the POAM and confirming the arbitrator's award.

II. Analysis

On appeal, the city argues that the arbitration award did not draw its essence from the parties' new CBA and therefore that the trial court erred in granting summary disposition to the POAM and confirming the award. While I agree with the city that the trial court misconstrued the arbitrator's opinion, I would hold that the arbitrator did not exceed his contractual authority in undertaking to interpret and apply the terms of the CBA as they applied to Officer Cavric. Because it is apparent that the arbitrator applied the Restatement of Contracts, 2d approach to

contract interpretation in determining that section 8.8 of the CBA did not apply to Officer Cavric until after he was recalled, the arbitration award does, in fact, draw its essence from the CBA and I would affirm.

A grant or denial of summary disposition is reviewed de novo to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A trial court's decision to enforce, vacate or modify an arbitration award is also reviewed de novo on appeal. *AFSCME Local 369, supra*. Judicial review of an arbitrator's decision is narrowly circumscribed. *Police Officers Ass'n of Michigan*, *supra*. This Court has set forth the limited standard that must be employed in reviewing labor arbitration decisions:

> "The necessary inquiry for this Court's determination is whether the award was beyond the contractual authority of the arbitrator. Labor arbitration is a product of contract and an arbitrator's authority to resolve a dispute arising out of the appropriate interpretation of a [CBA] is derived exclusively from the contractual agreement of the parties. It is well settled that judicial review of an arbitrator's decision is limited. A court may not review an arbitrator's factual findings or decision on the merits. Rather, a court may only decide whether the arbitrator's award 'draws its essence' from the contract. If the arbitrator in granting the award did not disregard the terms of his employment and the scope of his authority as expressly circumscribed in the contract, judicial review effectively ceases." [*Id*., quoting *City of Lincoln Park v Lincoln Park Police Officers Ass'n*, 176 Mich App 1, 4; 438 NW2d 875 (1989) (citations omitted by *Police Officers Ass'n of Michigan*).]

The powers of an arbitrator are not unlimited. *Id*. "An arbitrator is confined to interpretation and application of the [CBA]; he does not sit to dispense his own brand of industrial justice." *Sheriff of Lenawee Co, supra* (quotation marks and citation omitted). But, an arbitrator's award should be upheld as long as he does not disregard or modify plain and unambiguous provisions of a CBA. *Police Officers Ass'n of Michigan, supra*. "Thus, as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, a court may not overturn the decision even if convinced the arbitrator committed a serious error." *AFSCME Local 369, supra* (quotation marks and citations omitted).

The city argues, and the majority agrees, that the arbitrator exceeded the scope of his contractual authority to interpret and apply the terms of the CBA and resorted to his own form of industrial justice by disregarding the plain, unambiguous language of section 8.8 and basing his decision on parol evidence of the parties' alleged, tacit agreement to except Officer Cavric from the provision. The city is correct that under Michigan case law, when a contract is unambiguous, it must be enforced according to its terms. *Hamade v Sunoco, Inc*, 271 Mich App 145, 166; 721 NW2d 233 (2006); see also *Phillips v Homer (In re Smith Trust)*, 480 Mich 19, 24; 745 NW2d 754 (2008) (stating that when "contractual language is unambiguous, courts must interpret and enforce the contract as written because an unambiguous contract reflects the parties' intent as a matter of law"). Generally, parol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a clear, unambiguous contract. *Hamade*, *supra*, quoting *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 492; 579 NW2d 411 (1998).

There are exceptions to the parol evidence rule that have been adopted by this state. See, e.g., *Id*. at 167, stating that parol evidence of prior or contemporaneous agreements or negotiations is admissible to answer the threshold question of whether the written instrument is an integrated agreement; see also *UAW-GM Human Resource Ctr*, *supra*. But, the arbitrator in this case did not rely on any such exception. Rather, he applied the Restatement of Contracts, 2d approach to contract interpretation in interpreting the CBA. As the city points out and the POAM concedes, section 212 of the Restatement of Contracts, 2d, which permits the consideration of extrinsic evidence even if no ambiguity exists in the language of the contract, represents the minority view of contract interpretation and has not been adopted by this state. Courts of this state follow the strict construction/plain meaning approach to interpreting unambiguous contract language and do not resort to evidence of contract negotiations or of prior or contemporaneous agreements that contradict or vary the written contract, unless one of the exceptions to the parol evidence rule applies. See *Phillips*, *supra*; *Hamade*, *supra* at 166-167; *UAW-GM Human Resource Ctr*, *supra*.

However, while it is arguable that the arbitrator erred in considering parol evidence in interpreting the plain, unambiguous language of section 8.8, our function is to determine whether the arbitration award drew its essence from the CBA and was within the scope of the arbitrator's authority as set forth in the CBA, *Roseville Community School Dist v Roseville Federation of Teachers*, 137 Mich App 118, 123-124; 357 NW2d 829 (1984), not to review whether the arbitrator made errors of law or fact in interpreting the CBA. *Ferndale Ed Ass'n v School Dist for City of Ferndale No 1*, 67 Mich App 637, 643; 242 NW2d 478 (1976). Judicial review of cases referred to statutory arbitration under MCL 600.5001 *et seq*., includes considering whether the arbitrators acted in contravention of controlling principles of law, see *DAIIE v Gavin*, 416 Mich 407, 434; 331 NW2d 418 (1982), but statutory arbitration does not apply to CBAs, MCL 600.5001(3). Cases involving collective bargaining arbitration are subject to different rules, *Roseville Community School Dist*, *supra* at 121-123, and judicial review is narrowly circumscribed, *Police Officers Ass'n of Michigan*, *supra*.

Contrary to the city's argument on appeal and the majority's ruling, I find that the arbitrator did not disregard or modify the plain, unambiguous language of the CBA. The arbitrator found that the language of section 8.8 was plain and unambiguous, but concluded that the provision did not apply to Officer Cavric until after his recall given all of the relevant circumstances surrounding the enactment of the new CBA. Even if the arbitrator erred in this analysis, it is apparent that the arbitrator, in making the analysis, was interpreting the provisions of the CBA. The arbitrator's citation to the Restatement of Contracts, 2d, which permits the consideration of extrinsic evidence in interpreting a contract, even if no ambiguity exists, supports the conclusion that the arbitrator was, in fact, interpreting the language of the CBA. Thus, "whether [this Court] or the trial judge agree with the arbitrator's interpretation doesn't matter." *Ferndale Ed Ass'n*, *supra* at 643-644. Nor does it matter that the arbitrator may have committed an error of law in interpreting the CBA. *AFSCME Local 369*, *supra*; *Ferndale Ed Ass'n*, *supra* at 643. As indicated, if an arbitrator does not disregard the terms of his employment and the scope of his contractual authority to interpret and apply the terms of a CBA, "'judicial review effectively ceases.'" *Police Officers Ass'n of Michigan*, *supra*.

In its review of the arbitration award, the trial court found that the "arbitrator's consideration of [the] parol evidence appears . . . to be relevant not solely to the application of

Article 8.8 standing alone, but rather to that of Article 8.8 in combination with Article 8.5," which provided that "[n]o employee, after completing probation, shall be discharged or otherwise disciplined except for just cause." According to the trial court, "it is clear that [the arbitrator] based his opinion on Article 8.5 and found it to have been breached by the [city] where the arbitrator declared that 'the certain, direct and immediate result of [the city's proposal to add section 8.8] was the termination of [Officer Cavric's] employment–tantamount to his discharge without just cause.'" The court concluded that the plain, unambiguous language of section 8.8 was rendered ambiguous when viewed in combination with section 8.5 and the arbitrator's "consideration of [the] parol evidence clarified [this] latent ambiguity."

I do not agree with the trial court's analysis of the arbitrator's opinion. As the trial court conceded, the arbitrator made no mention of section 8.5 and only once stated that the city's application of the plain language of section 8.8, without an exception for Officer Cavric, resulted in the officer's discharge–"tantamount to his discharge without just cause." Viewed in context, it is apparent that the arbitrator referenced the concept of Officer Cavric's constructive discharge in considering whether section 8.8 immediately applied to Officer Cavric, who had already been laid off for 15 months, and noting that the city's objective in including section 8.8 in the new CBA–to avoid having employees assert recall rights 10 or 20 years after being laid off–could still be attained if section 8.8 did not apply to Officer Cavric until after his recall.

Despite my disagreement with the trial court's analysis, I would affirm its order granting summary disposition to the POAM and confirming the arbitration award. For the reasons indicated, I believe that the arbitrator did not exceed his contractual authority to interpret and apply the terms of the CBA and that the arbitration award draws its essence from the CBA given the circumstances surrounding Officer Cavric's layoff status at the time section 8.8 went into effect. Therefore, given the narrowly circumscribed standard of review that must be adhered to by this Court, *Police Officers Ass'n of Michigan*, *supra*, the award should be confirmed.

/s/ Jane M. Beckering